

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JERRY L. GILPIN</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>LANIER TRUCKING CO.</b>	)	
Respondent	)	Docket No. <b>1,059,754</b>
	)	
AND	)	
	)	
<b>SPARTA INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier (respondent) request review of the July 24, 2012 Preliminary Hearing Order entered by Administrative Law Judge Bruce E. Moore. Ronald L. Edelman, of Kansas City, Missouri, appeared for claimant. Darin M. Conklin, of Topeka, Kansas, appeared for respondent.

The record on appeal is the same as that considered by Judge Moore and consists of Dr. John Ciccarelli's independent medical examination (IME) report dated July 12, 2012, as well as all pleadings contained in the administrative file.<sup>1</sup>

**ISSUES**

Judge Moore found claimant was entitled to medical treatment as a result of a June 16, 2011 accidental injury. Respondent asserts Judge Moore erred in finding claimant sustained a compensable injury by accident as defined by K.S.A. 44-508(f). Such statute states, *inter alia*, that an "injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic." Claimant argues Judge Moore's Preliminary Hearing Order should be affirmed.

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<sup>1</sup> Of note, the Appeals Board is not considering Dr. David Ebelke's August 24, 2012 report which was appended to claimant's brief. Such report was neither offered and accepted into evidence by Judge Moore nor stipulated into evidence by agreement of the parties.

FINDINGS OF FACT

Claimant "suffered an injury to his lower back region following a work-related accident that occurred on June 16, 2011. At that time, [he] had actually been involved in a fairly substantial accident involving a tornado in his 18-wheeler vehicle which was actually picked up and thrown on to its side during the tornado."<sup>2</sup> Prior to the accident, claimant had preexisting, yet asymptomatic, spondylolisthesis at L4-5.

A preliminary hearing was set for June 7, 2012. On June 4, 2012, the parties agreed on a court-ordered IME with Dr. Ciccarelli. Judge Moore appointed Dr. Ciccarelli to conduct an IME regarding diagnosis, treatment recommendations and whether claimant's June 16, 2011 accidental injury was the prevailing factor in causing claimant's injury, present medical condition and impairment.

Dr. Ciccarelli evaluated claimant on July 12, 2012. Claimant had diffuse low back pain and bilateral leg pain. Claimant denied any preexisting back pain or leg issues. Dr. Ciccarelli opined:

I would agree with Dr. Reintjes as well as Dr. Reed regarding the patient's underlying spondylolisthesis being rendered symptomatic following this injury that occurred on June 16, 2011. I feel this would be the prevailing factor in requiring treatment for this gentleman given his onset of symptoms.<sup>3</sup>

Dr. Ciccarelli recommended epidural injections and the possibility of surgical decompression and stabilization primarily involving the L4-5 level.

After receiving Dr. Ciccarelli's report, Judge Moore issued a Preliminary Hearing Order dated July 24, 2012. Judge Moore ruled claimant suffered an accidental injury on June 16, 2011, that was the prevailing factor in causing claimant's preexisting, stable and asymptomatic spondylolisthesis to become unstable, resulting in low back and bilateral leg pain and his need for medical treatment. Judge Moore analyzed the case as follows:

In the court's view, Claimant clearly suffered personal injury by accident. His injuries were sustained in a ["]sudden and unexpected traumatic event . . . accompanied by a manifestation of force." He has experienced an injury in the form of a "change in the physical structure of the body" when his preexisting, but stable and asymptomatic, spondylolisthesis was rendered unstable by the force of the accident. The change in structure to the spondylolisthesis is causing pain in the low back and down both lower extremities. Claimant suffered personal injury by accident, and the accident was the prevailing factor in causing the injury.

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<sup>2</sup> Dr. Ciccarelli's IME report at 2.

<sup>3</sup> *Id.* at 5.

The question then becomes interpretation of the exclusionary language contained in **K.S.A. 2011 Supp. 44-508(f)(2)**. Applied literally, no injury that arises out of and in the course of work activity would be compensable if involvement in work activity would be "a triggering or precipitating factor." The next sentence of **K.S.A. 2011 Supp. 44-508(f)(2)** is also problematic, in that it provides that an ***injury*** is not compensable solely because ***it*** aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic. Again, applying the language literally, the injury must be distinct from the preexisting condition that is aggravated, exacerbated or rendered symptomatic. It is also unclear what the legislature meant in using "solely" to describe the causal relationship between the injury and the condition aggravated, exacerbated or rendered symptomatic. Given these anomalies, it is unclear what the legislature intended to exclude from coverage.

Here, the change in the stability of the preexisting spondylolisthesis is ***both*** the injury ***and*** the underlying preexisting condition that was aggravated and rendered symptomatic. They are not separate and distinct. The aggravation was not caused by the injury, solely or otherwise, but the prevailing factor in causing the injury ***and*** aggravation was the accident.<sup>4</sup>

#### PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-508 provides:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

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<sup>4</sup> ALJ Order (July 24, 2012) at 2.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

### ANALYSIS

Kansas law prior to May 15, 2011 allowed compensation for any aggravation, acceleration or intensification of a preexisting condition.<sup>5</sup> The new statutory changes refute the prior understanding of the law: "[a]n injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic."<sup>6</sup>

Judge Moore expressed uncertainty regarding what the legislature meant by the term "solely" in relation to an injury aggravating, accelerating, exacerbating or rendering symptomatic a preexisting condition.<sup>7</sup> The word "solely" is not defined in the Kansas Workers Compensation Act. Solely is defined as "singly" or "[e]xclusively."<sup>8</sup>

The June 16, 2011 injury literally rendered claimant's preexisting condition symptomatic, but the injury did not "solely" render claimant's preexisting condition symptomatic. The injury did more than just or exclusively cause an aggravation. The claimant had stable spondylolisthesis before his accidental injury. The accidental injury caused claimant's spondylolisthesis to become unstable. If claimant had unstable spondylolisthesis before the June 16, 2011 event and had unstable spondylolisthesis afterward, it would be true that the injury solely rendered symptomatic the preexisting condition. Instead, the injury changed the physical structure of claimant's previously stable spondylolisthesis.

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<sup>5</sup> *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 589, 257 P.3d 255 (2011).

<sup>6</sup> K.S.A. 2011 Supp. 44-508(f)(2).

<sup>7</sup> ALJ Order (July 24, 2012) at 2.

<sup>8</sup> *Poull v. Affinitas Kansas, Inc.*, No. 102,700, 228 P.3d 441 (Kansas Court of Appeals unpublished decision dated Apr. 8, 2010).

There is no evidence claimant's June 16, 2012 injury "solely" rendered his preexisting spondylolisthesis symptomatic. This Board Member's opinion may be different if Dr. Ciccarelli opined that the injury solely rendered claimant's spondylolisthesis symptomatic. Instead, Dr. Ciccarelli opined the accident was the prevailing factor in claimant's need for medical treatment.

The Appeals Board has found that accidental injuries resulting in a new physical finding, or a change in the physical structure of the body, are compensable, despite the claimant also having an aggravation of a preexisting condition. Several prior Appeals Board decisions tend to show compensability where there is a demonstrated physical injury above and beyond a sole aggravation of a preexisting condition:

- A claimant's accident did not "solely" cause an aggravation of preexisting carpal tunnel syndrome when the accident also caused a triangular fibrocartilage tear.<sup>9</sup>
- A low back injury resulting in a new disk herniation and new radicular symptoms was not solely an aggravation of a preexisting lumbar condition.<sup>10</sup>
- A claimant's preexisting ACL reconstruction and mild arthritic changes in his knee were not solely aggravated, accelerated or exacerbated by an injury where his repetitive trauma resulted in a new finding, a meniscus tear, that was not preexisting.<sup>11</sup>
- An accident did not solely aggravate, accelerate or exacerbate claimant's preexisting knee condition where the court ordered doctor opined that the accident caused a new tear in claimant's medial meniscus.<sup>12</sup>
- Claimant had a prior partial ligament rupture, but a new accident caused a complete rupture, "a change in the physical structure" of his wrist, which was compensable.<sup>13</sup>

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<sup>9</sup> *Homan v. U.S.D.* #259, No. 1,058,385, 2012 WL 2061780 (Kan. WCAB May 23, 2012).

<sup>10</sup> *MacIntosh v. Goodyear Tire & Rubber Co.*, No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012).

<sup>11</sup> *Short v. Interstate Brands Corp.*, No. 1,058,446, 2012 WL 3279502 (Kan. WCAB July 13, 2012).

<sup>12</sup> *Folks v. State of Kansas*, No. 1,059,490, 2012 WL 4040471 (Kan. WCAB Aug. 30, 2012).

<sup>13</sup> *Ragan v. Shawnee County*, No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012).

This Board Member finds that claimant's preexisting, yet stable, spondylolisthesis, was not solely rendered symptomatic. Rather, the structure of claimant's previously asymptomatic spondylolisthesis changed. The injury caused claimant's stable spondylolisthesis to become unstable, resulting in low back pain and bilateral leg symptoms.

**CONCLUSION**

This Board Member affirms Judge Moore's Preliminary Hearing Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>14</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>15</sup>

**WHEREFORE**, the undersigned Board Member finds that the July 24, 2012 Preliminary Hearing Order entered by ALJ Bruce E. Moore is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November, 2012.

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HONORABLE JOHN F. CARPINELLI  
BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge

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<sup>14</sup> K.S.A. 44-534a.

<sup>15</sup> K.S.A. 2011 Supp. 44-555c(k).